Supreme Court, U.S.
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No. 99-765

In The

Supreme Court of the United States

CSC CONSULTING, INC.,

Petitioner,

v.

TINGLEY SYSTEMS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Respondent disagrees with the questions presented by the Petitioner. The only issue presented for review is whether the First Circuit correctly applied the doctrine of res judicata to the particular facts of this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, Tingley Systems, Inc., discloses that it is a privately held corporation, has no parent corporation, no subsidiary and no publicly held company owns any stock in Tingley Systems, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Tingley Systems, Inc., respectfully asks that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion entered by the United States Court of Appeals for the First Circuit in this case on June 30, 1999.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

The Respondent disagrees with the Petitioner's statement of the statutory and other provisions involved. Res judicata is a judicial doctrine, and as such, no statute or rule of procedure is directly involved in this Petition.

STATEMENT OF THE CASE

Tingley Systems, Inc. ("Tingley") sued one of its customers, Bay State HMO Management, Inc. ("Bay State"), in June 1993 for breach of contract and misappropriation of trade secrets in Tingley's computer software. (Petition

p. 3.)[1] About the same time, Bay State sued Tingley in the United States District Court in Boston, Massachusetts seeking a declaratory judgment concerning the parties' rights in the software. *Id.* The Tingley case was transferred to the federal district court in Boston and the cases were consolidated. *Id.*

In December 1993, during discovery in the consolidated Bay State/Tingley cases, Tingley served a Subpoena Duces Tecum upon CSC Consulting, Inc. ("CSC"), one of the consultants which provided computer consulting services for Bay State. (Response App. pp. 1-3.)[2] CSC furnished documents to Tingley in January 1994, which it claimed were all of the documents responsive to the subpoena. *Id.* On November 15, 1994, Tingley deposed Victoria Gifford ("Gifford"), a key employee of CSC who worked on the Bay State project. During the deposition, Tingley learned that Gifford had documents related to the Bay State project. Tingley then served a Subpoena Duces Tecum on Gifford for those documents during her deposition. (Response App. pp. 4-6.) In mid-December 1994, after the November 30 discovery cut-off in the Bay State/Tingley case, CSC produced documents responsive to both Tingley's December 1993 and November 1994 subpoenas to CSC and Gifford. (Response App. pp. 7-9.) The documents revealed that CSC and Gifford had obtained

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[1] Tingley's citations to CSC's Petition are in the following form: Petition p. x. If the citation is to the Petition's Appendix, the citation is Petition App. p. x. Citations to the Appendix to this Response are in the following form: Response App. p. x.

[2] The documents comprising Tingley's Appendix are not reproduced in their entirety. Only the portions relevant to this Response have been reproduced.

Tingley's proprietary file structures from Tingley's software, studied them and loaded them into software which CSC was developing for Bay State. *Id.* Although the incriminating CSC documents were due to be produced under both subpoenas prior to the discovery cutoff, CSC did not produce the documents until after the discovery cutoff. *Id.*

On February 9, 1995, based upon the information revealed in the CSC documents, Tingley sued CSC for copyright infringement and misappropriation of trade secrets. (Response App. pp. 10-11.) Tingley filed its suit against CSC in the same court in which the consolidated Bay State/Tingley cases were pending. *Id.* Tingley notified the clerk of that court that the CSC case was a "related case" to the consolidated Bay State/Tingley cases, resulting in the assignment of the CSC case to the district court judge who was handling the Bay State/Tingley case. (Response App. pp. 46, 49-50.) On February 10, 1995, Tingley moved to consolidate the CSC case with the Bay State/Tingley cases. (Response App. pp. 12-14.) On July 11, 1995, Tingley's motion to consolidate was granted and the court consolidated the CSC and Bay State cases into "one proceeding." (Petition App. p. 4.)[3] Thereafter, everything filed in the CSC and Bay State cases was entered on the docket by the district court as if it had been filed in each case. For example, CSC's Answer and Counterclaim, filed on July 25, 1995, was entered by the

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[3] The district court's jurisdiction over the consolidated case was based on 28 U.S.C. § 1332. Because the case involved copyright infringement, jurisdiction was also proper under 28 U.S.C. § 1331 and 28 U.S.C. § 1338.

court in the dockets of both the Bay State and CSC cases, and CSC was identified on the docket sheet in the Bay State/Tingley cases as the "consolidated defendant." (Response App. p. 16.)

Even before the CSC and Bay State cases were consolidated, the district court held joint hearings on motions pending in the cases, for the convenience of both the court and the parties. (Response App. pp. 20-22.) Also, the court entered an order on September 12, 1995 providing that all the discovery taken in the Bay State/Tingley cases could be used in the CSC case as if the discovery had been obtained in the CSC case. (Response App. pp. 23-26.) The court also commented, before it consolidated the cases, that it viewed these related cases as just "one big case." (Petition App. p. 16.)

CSC's answer to the Amended Complaint denied that CSC had access to Tingley's software and documentation, that CSC copied the software and documentation, and denied that CSC had conspired with Bay State to misappropriate the Tingley software. (Response App. pp. 27-30.) On July 25, 1995, Tingley filed a Second Amended Complaint in the consolidated cases, pleading additional allegations of fraud against Bay State. (Response App. pp. 31-34.) The Second Amended Complaint captioned *both* the Bay State/Tingley cases and the CSC case. (*Id.*; Petition App. pp. 37-38.)

In September 1995, Tingley and Bay State reached a settlement of the claims between them. (Petition App. p. 5.) The Settlement Agreement specifically acknowledges Tingley's intent and right to continue its suit against CSC, makes arrangements that bear out that

intent, and specifically states Tingley's refusal to release any claims that Tingley has against CSC and contemplates that the CSC action will continue. (Petition App. p. 24.) Attached to the Settlement Agreement was the Stipulation and Order of Dismissal, which Tingley and the Bay State defendants signed and which was entered as an order by the Court on September 12, 1995. (Petition App. p. 5.) The Stipulation and Order of Dismissal, which captions *both* the Bay State/Tingley cases and the CSC case, dismissed the claims between Tingley and the Bay State defendants only. *Id.*

On October 17, 1995, CSC filed a motion for summary judgment, seeking the dismissal of Tingley's claims against CSC on the basis of res judicata. (Petition App. p. 5.) CSC argued, among other things, that Tingley brought its lawsuit against CSC for the purpose of obtaining discovery to use in the Bay State/Tingley litigation. (Petition App. pp. 17-18.) The district court granted CSC's Motion for Summary Judgment. (Petition App. p. 5.) The district court did not state that it agreed with CSC's accusation that Tingley had sued CSC for the purpose of obtaining discovery in the Bay State cases and it noted that granting CSC's Motion for Summary Judgment "seemed harsh." (Petition App. pp. 32-33.)

Tingley timely appealed to the First Circuit Court of Appeals. Tingley argued that the Summary Judgment should be reversed because, among other reasons, the court should treat the consolidated cases as a single action for res judicata purposes under the facts of this case. (Petition App. p. 6.) Tingley also argued that CSC was not in privity with Bay State and that CSC had consented to the alleged claim splitting. *Id.*

In its Response, CSC argued that the consolidated cases should not be treated as a single case for res judicata purposes because, according to CSC, Tingley sued CSC in the second suit for the purpose of obtaining discovery to use in the Bay State lawsuit. (Response App. pp. 35-43.) CSC argued that such motivation made the case "cry out" for the application of res judicata. (*Id.* at p. 42.) CSC has suggested the same equitable argument in its Petition for Writ of Certiorari (the "Petition") to this Court, unnecessarily appending to its Petition a copy of Tingley's Motion to Extend Discovery Cutoff, filed in the Bay State/Tingley cases, and the district court order denying the motion. (Petition p. 4; Petition App. pp. 96-116; 117-18.) However, CSC failed to inform this Court that when Tingley sued CSC, its motion to take additional depositions in the Bay State/Tingley cases had been denied "without prejudice." Tingley was permitted to renew its motion to take additional depositions after the court decided Tingley's motion to compel production of documents, which was not decided until months after Tingley sued CSC. (Response App. pp. 44-45)

The First Circuit Court of Appeals reversed the decision of the district court, holding that "under the limited circumstances presented here, the consolidated cases should have been treated as a single action for res judicata purposes. . . . " and that "the application of res judicata was inappropriate." (Petition App. p. 18.)

REASONS FOR DENYING THE WRIT

The issue raised in the Petition is whether the First Circuit Court of Appeals incorrectly applied the doctrine of res judicata to the unique facts of this case. The petitioner does not challenge the First Circuit's statement of the res judicata doctrine. Instead, the petitioner contends that the First Circuit did not correctly apply res judicata because the First Circuit considered equity and the policy considerations underlying the res judicata doctrine, when applying the doctrine in this case. (Petition at pp. 22-26). The petitioner contends that under this Court's decision in *Federal Dep't Stores v. Moitie*, 452 U.S. 394 (1981), policy and equity considerations are irrelevant to the application of res judicata. The petitioner also argues that the First Circuit's decision is at odds with *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933) and *Mutual Life v. Hillmon*, 145 U.S. 285 (1892), which hold that consolidation does not merge cases into a single cause or change the rights of the parties.

The Petition should be denied. The First Circuit's decision is consistent with *Johnson*, *Hillmon* and *Moitie*. Moreover, the First Circuit properly considered policy and equity considerations when deciding whether to treat the consolidated cases as a single action for res judicata purposes.

I. The First Circuit's Decision Is Consistent with *Johnson* and *Hillmon*.

At the outset, it is important to note that the First Circuit expressly restricted the scope of its decision to the "limited circumstances presented here." (Petition App.

p. 18.) This is simply not the type of decision that warrants review in this Court. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Moreover, the limited issue decided by the First Circuit – whether "the consolidated cases should have been treated as a single action for res judicata purposes" – does not conflict with any other case.

The issue on appeal in *Johnson* was the authority of a specially assigned judge to entertain an application for the appointment of receivers in a suit in equity. In deciding that question, the Court mentioned the effect of consolidation made pursuant to a federal statute, even though the issue of consolidation was not directly on appeal. This Court wrote:

> Under the statute, 28 U.S.C. §734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause or change the rights of the parties or make those who are parties in one suit parties in another.

Id. at 496-497.

Significantly, this Court did not address in *Johnson* whether consolidated cases could be treated as a single cause for certain purposes. Clearly, once cases are consolidated under Rule 42 of the Federal Rules of Civil Procedure, they are treated as a single cause for some purposes, including trial and discovery.

The First Circuit addressed *Johnson* in its decision and stated, consistent with *Johnson*, that the consolidation

of cases does not merge two separate actions into a single cause. The First Circuit further recognized, however, that *Johnson* said nothing about whether consolidated cases could be treated as a single action for res judicata purposes. The First Circuit's decision, therefore, is not inconsistent with *Johnson*. *Johnson* did not address the issue of whether there were circumstances under which consolidated cases could be treated as a single cause for res judicata purposes.

Nor is the First Circuit's decision inconsistent with the decisions of any other federal court of appeals. As the First Circuit correctly pointed out, there are only three other federal circuit courts which have considered this issue, either directly or indirectly, and each is consistent with the decision of the First Circuit in this case. *Bay State HMO Management, Inc. v. Tingley Systems, Inc.*, 181 F.3d 174, 177-178 (1st Cir. 1999). The Second Circuit Court of Appeals, in *Devlin v. Transportation Communication Int'l Union*, 175 F.3d 121, 129-130 (2d Cir. 1999), recognized that the policies supported by res judicata would not be served by applying the res judicata doctrine to the plaintiff in the related cases before it, which were pending in the same court, at the same time and before the same judge. Similarly, the Fifth Circuit, in *Langston v. Ins. Co. of N. Am.*, 827 F.2d 1044, 1048 (5th Cir. 1987), suggested that consolidation would have prevented the application of res judicata in that case. Finally, the Seventh Circuit, in *Hagee v. City of Evanston*, 729 F.2d 510, 514 (7th Cir. 1984), stated that res judicata is "tantamount to a rule requiring parties to *consolidate* all closely related matters into one suit." (emphasis added). Thus, the only federal circuit courts which have considered res judicata in this factual

context are in agreement with each other.[4] The Petition should be denied because the decision to be reviewed is consistent with the decisions of this Court and the other federal circuit courts.

The First Circuit's decision is also not inconsistent with this Court's decision in *Mutual Life*. In *Mutual Life*, where three cases had been consolidated for trial, this Court held that the consolidation did not cause any party to lose its right to three peremptory challenges in jury selection. If the cases had been tried separately, each defendant would have had a statutory right to three peremptory challenges. The Court held that the consolidation of the cases did not deprive the defendants of that right. The Court stated that consolidation cannot deprive a defendant "without its consent, of any right material to its defense, whether by way of challenge of jurors, or by objection to evidence, to which it would have been entitled if the cases had been tried separately." *Mutual Life*, 145 U.S. at 293.

In contrast to the facts in *Mutual Life*, consolidation in the present case did not deprive the petitioner of any material right to its defense that it already had before the consolidation. When the cases were consolidated in July

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[4] The petitioner's extensive discussion of different rules among the federal circuit courts regarding the appealability of consolidated cases under Rule 54(b) Fed. R. Civ. P. is irrelevant to the issue here, which is whether the First Circuit correctly determined that these consolidated cases should be treated as a single cause for res judicata purposes. The First Circuit did not decide this case based upon the effect of consolidating cases on Rule 54(b) and, in fact, pointed out that this case did not involve any Rule 54(b) issue. *See Bay State*, 181 F.3d at 178-79.

1995, CSC had no res judicata right because there was not a judgment entered in the first suit.[5]

In addition, the petitioner had no res judicata rights regardless of consolidation. As the First Circuit correctly pointed out, the res judicata doctrine did not apply because the cases were pending at the same time, in the same court, before the same judge. *See Bay State*, 181 F.3d at 181. Thus, none of the policy considerations of res judicata were implicated. *Id.* Similarly, the Second Circuit in *Devlin* overturned the application of res judicata, even though there had been no consolidation, where the cases under review were pending in the same court, at the same time, on the active docket of the same judge. *See Devlin*, 175 F.3d at 129-130. *See also Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 347 (2d Cir. 1995) (describing the use of res judicata as "somewhat of an ambush" where the first and second closely related actions proceeded together before the same court, absent only a formal consolidation order).

The facts in this case present an even more compelling argument than the facts in *Devlin* for treating such related cases as a single action for res judicata purposes because (1) the cases in the present case were consolidated, removing any possibility of inconsistent results; (2) even before consolidation, the lower court viewed the cases as just "one big case," and heard motions in the Bay State/Tingley/CSC cases at joint hearings for the convenience of the court and of the parties; and (3) the court

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[5] Nor could there have been, because if judgment had been entered in the first case there would not have been a case with which to consolidate the second case.

consolidated the discovery in the cases. None of the policies supporting the res judicata doctrine would have been served by treating these consolidated cases as separate cases for res judicata purposes.

The rights protected by applying res judicata to preclude a case are the rights to not have to endure the cost and vexation of multiple lawsuits and to avoid the possibility of inconsistent results. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). CSC never lost these rights because the CSC case always was pending in the same court, at the same time, on the active docket of the same judge who presided over the Bay State/Tingley cases and was consolidated with those cases. Therefore, as the First Circuit correctly pointed out, there was no costly and vexatious litigation and no possibility of inconsistent results.

CSC argues that it has lost the right to "assert" res judicata as a defense. (Petition p. 9.) CSC has not lost the right to assert the defense or have it applied because CSC never had that right. There is no right to have the res judicata doctrine applied when one of the requirements for applying res judicata has not been satisfied.

II. The First Circuit Correctly Applied the Res Judicata Doctrine.

The petitioner finds fault with the First Circuit for assessing the preclusive effect of a judgment by looking to the policies supported by the res judicata doctrine. This Court, however, has instructed courts to do just that. In *Allen v. McCurry*, 449 U.S. 90, 96 (1980) this Court instructed that, in assessing the preclusive effect of a judgment under the res judicata doctrine, a federal court

"may look to the common law or to the policies supporting res judicata and collateral estoppel . . . " This Court also has instructed that, in the federal courts, res judicata is "almost entirely judge-made" and in developing rules regarding res judicata, the court should be guided by federal policies. *Heck v. Humphrey*, 512 U.S. 477, 489 n.9 (1994). *See also United States v. Mendoza*, 464 U.S. 154 (1984) (recognizing exceptions to general principles of res judicata in light of overriding federal policy concerns).

The policies supporting res judicata are (1) to relieve parties of the cost and vexation of multiple lawsuits, (2) to conserve judicial resources, and (3) to encourage reliance on adjudication by preventing inconsistent decisions. *See Allen v. McCurry*, 449 U.S. at 94. This Court has looked to those policies for guidance in determining the scope of both res judicata and collateral estoppel. *See id.*; *United States v. Mendoza*, 464 U.S. 154, 158 (1984). The First Circuit correctly identified those policies and considered them in its decision, solely to determine whether to treat these consolidated cases as a single action for res judicata purposes:[6]

> First there was no "cost and vexation of multiple lawsuits." At the time of the settlement, these cases were proceeding as if one case had been filed against co-defendants CSC and Bay State. The continuance of the case against CSC when only Bay State chose to settle is not the type of cost or vexation with which the res judicata doctrine is concerned. Second, Tingley's

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[6] Contrary to CSC's argument, the First Circuit never purported to weigh "public policy" against the res judicata doctrine to determine whether to apply res judicata in this case.

> actions did nothing to waste judicial resources. In asserting its claims against CSC, it mattered little in terms of judicial efficiency whether Tingley amended its pending Bay State action or filed a new action and immediately consolidated them. The cases still proceeded as if only one case existed. Finally, there was no concern for inconsistent decisions here because the cases were consolidated. This was not a situation in which one case was filed and proceeded to judgment, only to have another case come along threatening a contrary result. There was no greater risk of inconsistency here than would have existed if all claims had been brought by Tingley in one comprehensive complaint. As demonstrated above, one purpose of the res judicata doctrine is to prevent a plaintiff from raising claims that should have been raised in an earlier action. Thus, when a plaintiff consolidates two actions in order to ensure that all claims will be adjudicated together, it makes little sense to bar the later-filed claims once the original claims are settled.

(Petition App. pp. 16-17.) After explaining why none of the policies supported by the application of res judicata were served by treating the consolidated cases as a single action for res judicata purposes, the court of appeals held solely that, under the "limited circumstances of this case, these consolidated cases should have been treated as a single action for res judicata purposes." (Petition App. p. 18.)

CSC argues that the policies supported by the res judicata doctrine are irrelevant to determining whether an element of the res judicata doctrine applies in a given case. This is tantamount to an argument that there should

not be any exception to the res judicata doctrine which is justified on the basis that it advances the policies supported by res judicata. Such an argument ignores well established law. For example, when a party consents to claim splitting, the res judicata bar will not be applied. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(a)(1) (1982). *See also Calderon Rosado v. General Elec. Circuit Breakers,* 805 F.2d 1085, 1087 (1st Cir. 1986); *Keith v. Aldridge,* 900 F.2d 736 (4th Cir. 1990), *cert. denied,* 498 U.S. 900 (1990). The Restatement explains that the justification for this exception, is to advance "the main purpose" of the rule of bar, which is to "protect the defendant from being harassed by repetitive actions based on the same claim." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(a)(1), cmt. a (1982). *See also id.* § 26(a)(1), cmt. j (Comment j states that "[a] defendant cannot *justly* object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud.") (emphasis added). *Moitie* was not so broad, as CSC suggests, to render null and void all exceptions to the application of res judicata, which may be based upon policy considerations or equity.

Finally, the petitioner has criticized the First Circuit for discussing equitable issues in reaching its decision. The petitioner's criticism is remarkable, given the fact that the petitioner raised equitable issues in response to Tingley's arguments in CSC's brief to the First Circuit Court of Appeals. (Response App. pp. 35-43.) The petitioner attempted to mischaracterize the record to persuade the First Circuit that the respondent filed a second lawsuit in the same court for the sole purpose of obtaining discovery which it could not obtain in the first suit,

and argued that such motivation made this case "cry out" for the application of res judicata. (Response App. pp. 35-43, 46-54.) While neither the district court nor the First Circuit Court of Appeals accepted the petitioner's accusation that the respondent brought the second suit to obtain discovery for use in the first suit, the Court of Appeals did respond to CSC's equitable argument and addressed the equities of the case in deciding whether to treat the consolidated cases as a single suit for res judicata purposes.

The First Circuit did not create an equitable exception to an otherwise valid application of the res judicata doctrine and its decision is not inconsistent with *Moitie*. In *Moitie*, the intermediate appellate court found that all of the elements of res judicata were present, but that an exception should be created due to equitable considerations. 452 U.S. at 401. In contrast, in this case, the First Circuit found that at least one of the elements of res judicata, a final judgment on the merits in an earlier action, was missing. To the extent the First Circuit considered equity, it did so only to determine whether the consolidated actions should be treated as a single action for res judicata purposes. *Bay State*, 181 F.3d at 182. *Moitie* did not consider or decide this issue.

III. The First Circuit Never Addressed or Resolved the Co-Conspirator Issue, and Thus, the Issue Should not be Reviewed by This Court.

The third question presented for review in the Petition provides absolutely no basis for the issuance of a writ of certiorari. The First Circuit's decision was based

solely on its conclusion that the *first* element of res judicata – a final judgment on the merits in an earlier action – was not present. The First Circuit expressly did not address any other element of the doctrine: "CSC and Tingley dispute the first and third elements. . . . Because we find that the first element is not satisfied, we do not address Tingley's other contentions." (Petition App. p. 6.) That is, the court of appeals did not rule on the issue raised in CSC's third question – whether there was sufficient identity of the parties in the two suits to warrant application of res judicata. CSC has not cited to any authority that supports its contention that an issue that was not addressed or resolved by the First Circuit Court of Appeals may serve as the basis for the issuance of a writ of certiorari. With respect to that question, then, there is simply nothing for this Court to review.

In addition, one of the bases for Tingley's appeal to the First Circuit Court of Appeals was whether there were disputed issues of material fact regarding the issue of privity between CSC and Bay State. Disputed issues of fact are not a proper grounds for invoking the jurisdiction of this court in a petition for writ of certiorari. *See* Sup. Ct. R. 10. The First Circuit did not decide the question of whether there are disputed issues of material fact because that issue was mooted. Therefore, addressing the third question raised by CSC in its Petition would be nothing more than an academic exercise as it relates to the merits of this case, because in the event of a remand by this Court, the First Circuit could still reverse on the basis that there are disputed issues of material fact.

CONCLUSION

The First Circuit correctly applied the res judicata doctrine to the special facts and circumstances of this case and its decision does not conflict with decisions from this or any other federal appellate court. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: January 21, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BAY STATE HMO
MANAGEMENT, INC.,

Plaintiff,

v. C.A. NO. 93-11283-RCL

TINGLEY SYSTEMS, INC.,

Defendant.

_____/

TINGLEY SYSTEMS, INC.,

Plaintiff,

v. C.A. NO. 93-12230-RCL

BAY STATE HEALTH
MANAGEMENT, INC. f/k/a
BAY STATE HMO
MANAGEMENT, INC. and
BLUE CROSS/BLUE SHIELD
OF MASSACHUSETTS, INC.,

Defendants.

_____/

TINGLEY SYSTEMS INC.'S REPLY TO CSC'S OPPOSITION TO TINGLEY SYSTEMS, INC.'S MOTION FOR CONSOLIDATION OF RELATED ACTIONS

Tingley Systems, Inc. ("TSI"), hereby replies to CSC's Opposition to TSI's Motion for Consolidation of Related Actions ("CSC's Opposition"), as follows:

TSI, after obtaining highly incriminating evidence of CSC Consulting, Inc.'s, f/k/a CSC Partners, ("CSC")

participation in Bay State's misappropriation of its trade secrets contained in the TSI software system, sued CSC. CSC, although not yet a party to this action, filed an opposition to TSI's Motion to Consolidate. TSI has not opposed CSC's request to file such Opposition based upon CSC's agreement that TSI may reply to the Opposition. Because

* * *

CSC points to the timing of TSI's initiation of litigation against CSC as its evidence that TSI sued CSC only to get discovery concerning TSI's claims against Bay State and BCBS. Their argument ignores the fact that TSI's suit against CSC is based largely on the Gifford documents, which CSC withheld from production in January, 1994 and which TSI did not obtain until December, 1994. CSC, not TSI, controlled when TSI obtained this information. This, in turn, significantly influenced when TSI would sue CSC. This is not the only instance of CSC's delay in producing subpoenaed documents. Within the last ten days, CSC produced over 2,000 more documents to TSI which are directly responsive to TSI's December, 1993 subpoena to CSC. Although some of these documents are duplicates of others previously produced, many are not. Many of these new documents bear directly on testimony of witnesses already deposed in this case and bear directly on the issues raised in TSI's Complaint against CSC.

If CSC had fully complied with the TSI subpoena in January, 1994, and produced *all* of the documents requested, then TSI would have sued CSC sooner. CSC, not TSI, is to blame for withholding the information

which TSI relied upon to bring its suit against CSC. TSI's decision to sue CSC on February, 1995, therefore, cannot reasonably be viewed as merely some device to obtain additional discovery.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TINGLEY SYSTEMS, INC., Plaintiff,	)	
v.	)	Civil Action No. 95-10284-RCL
CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC., Defendant.	)	

TSI'S OPPOSITION TO CSC'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, TINGLEY SYSTEMS, INC. ("TSI"), hereby files this Opposition to the motion of Defendant, CSC CONSULTING, INC. f/k/a CSC PARTNERS, INC. ("CSC"), for summary judgment and alleges:

STATEMENT OF THE CASE AND FACTS

TSI is a family run business that creates, sells and supports computer software for the Health Maintenance Organization ("HMO") industry. TSI and one of its customers, Bay State HMO Management, Inc. ("Bay State") had a dispute concerning Bay State's alleged use of the TSI software to create software to which Bay State claimed ownership. When TSI indicated that they would be suing Bay State concerning this dispute, Bay State sued TSI in United States District Court in Boston, Massachusetts seeking a declaratory judgment that Bay State owned the new software. TSI then immediately sued Bay State in the United States District Court for the Middle

District of Florida alleging misappropriation of TSI's trade secrets in the file structure of its proprietary software and breach of the software license agreement. Bay State successfully

* * *

deposition that copies of these weekly status reports had been distributed to multiple levels of management within CSC and that she had retained copies of the weekly status reports that she had prepared. *Id.* None of her status reports were produced by CSC in January, as required by the subpoena, although some weekly reports had been produced for some other CSC consultants. TSI served Gifford with a subpoena for her status reports during the deposition. (Ex.2). CSC produced Gifford's status reports to TSI in mid-December, weeks after the date they were due in response to the Gifford subpoena and eleven months after the due date of the first subpoena.[2]

Gifford's weekly status reports revealed that she had obtained access to the TSI trade secret file layouts, "studied" them and then "loaded" them into the software which CSC was creating for Bay State. (Ex.3). Armed with this strong evidence, TSI decided to sue CSC. This was a difficult decision to make, given the fact that TSI already was in very expensive litigation with two well-financed defendants, and CSC, a billion dollar corporation, undoubtedly would make the litigation even more expensive. Given the fact that the pretrial and trial dates in the

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[2] CSC's production also was *after* the discovery cut-off date in the consolidated cases.

Bay State litigation were quickly approaching, TSI brought a second action in federal court in Boston.

TSI filed a motion to consolidate the TSI suit against CSC with the consolidated cases between TSI, Bay State and BCBS. CSC

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TINGLEY SYSTEMS, INC., Plaintiff, vs. CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC., Defendant.	C.A. NO. 95-10284

DECLARATION OF G. DONOVAN CONWELL, JR. IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

My name is G. Donovan Conwell, Jr., I am over 21 years of age, I have personal knowledge of the matters set forth in this declaration and am otherwise qualified to make this declaration.

1. I am one of the attorneys for Tingley Systems, Inc. ("TSI"), a party in this cause and in Bay State HMO Management, Inc. vs. Tingley Systems, Inc., Civil Action No. 93-11283 RCL and, Tingley Systems, Inc. v. Bay State Health Management, Inc. f/k/a Bay State HMO Management, Inc. and Blue Cross/Blue Shield of Massachusetts, Inc., Civil Action No. 93-12230-RCL

2. In mid-December, 1994 CSC Consulting, Inc ("CSC") produced documents to TSI, including Status Reports of Vicky Gifford that are attached as Exhibit 3 to TSI's Opposition to CSC's Motion for Summary Judgment. These documents are responsive to a subpoena

served on CSC by TSI in December 1993, as well as to a subpoena served on Vicky Gifford on November 15, 1994. The documents admit that CSC had obtained, and then studied TSI's file layouts. After TSI read and evaluated these documents, TSI decided to sue CSC for misappropriation of TSI's trade secrets.

3. In August, 1995 counsel for Bay State HMO Management, Inc. and Blue Cross Blue Shield of Massachusetts, Inc. (the "Bay State Defendants"), Marc Temin, and I agreed to discuss settling the cases between TSI and the Bay State Defendants.

4. TSI made a demand that would have settled all three consolidated cases if accepted. I told counsel for the Bay State Defendants that I would leave it to him to contact CSC's counsel about their client's contribution. He reported back to me that CSC was not interested in discussing settlement at this time and that CSC was willing to continue litigating with TSI. He then argued that since TSI's claims against CSC would continue to be litigated if TSI settled only with the Bay State Defendants, then TSI's settlement demand should be reduced. On that basis, TSI substantially reduced its settlement demand. The parties continued to have settlement discussions for weeks on the basis that TSI's claims against CSC would not be impaired by the settlement with the Bay State Defendants.

5. TSI and the Bay State Defendants reached a settlement agreement which is attached as Exhibit "8" to TSI's Opposition to CSC's Motion for Summary Judgment. The agreement specifically acknowledges the parties' intent, and TSI's right, to continue TSI's suit against

CSC. Special provisions are included to make sure that TSI's suit against CSC would continue unimpaired by the settlement and agreed upon dismissal. For example, the Agreement

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TINGLEY SYSTEMS, INC., Plaintiff, vs. CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC., Defendant.	C.A. NO.

COMPLAINT

INJUNCTIVE RELIEF REQUESTED

Plaintiff, Tingley Systems, Inc. ("TSI"), sues the defendant, CSC Consulting, Inc., f/k/a CSC Partners, Inc. ("CSC") and alleges:

Parties

1. TSI is a Florida corporation with its principal place of business in San Antonio, Florida. TSI creates, supports and distributes computer software for the healthcare management organization ("HMO") industry.

2. CSC is a Massachusetts corporation with its principal place of business in Waltham, Massachusetts. CSC is a subsidiary corporation of Computer Sciences Corporation and a sister corporation of CSC COMTEC, one of TSI's largest competitors. CSC provides computer technology consulting services and systems design, development and integration services.

Jurisdiction

3. The matter in controversy exceeds the sum of Fifty Thousand Dollars ($50,000), exclusive of interest and costs, and

* * *

should be required to compensate TSI and pay a license fee to TSI for CSC's use and enjoyment of the TSI Software and documentation.

WHEREFORE, TSI requires that this Court award TSI compensatory damages, attorneys fees, costs, interest and such other and further relief as this Court deems just and proper.

JURY TRIAL DEMAND

TSI demands a trial by jury on all issues so triable.

/s/ G. Donovan Conwell, Jr.
G. Donovan Conwell, Jr.
Fla. Bar No. 371319
Guillermo A. Pernas, Jr.
Fla. Bar No. 0000574
Brent J. Gibbs
Fla. Bar No. 986348
Fowler, White, Gillen, Boggs, Villareal & Banker, PA.
501 E. Kennedy Blvd.,
Tampa, FL 33601
(813) 228-7411

Counsel for
Tingley Systems, Inc.

/s/ Laurence H. Reece, III
Laurence H. Reece, III
Bar No.: 414460
Heidlage & Reece, P.C.
One Liberty Square
Boston,
Massachusetts 02109
(617) 423-1200

Local Counsel for
Tingley Systems, Inc.

Dated: February 9, 1995.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TINGLEY SYSTEMS, INC., Plaintiff, vs. CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC., Defendant.	C.A. NO. 95-10284

TINGLEY SYSTEM, INC.'S MOTION FOR CONSOLIDATION OF RELATED ACTIONS AND SUPPORTING MEMORANDUM

Plaintiff, Tingley Systems, Inc. ("TSI"), pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, hereby moves that the related actions styled Bay State Bay State [sic] HMO Management, Inc. v. Tingley Systems, Inc. (C.A. No. 93-11283-RCL), and Tingley Systems, Inc. v. Bay State Health Management, Inc., f/k/a Bay State HMO Management, Inc. and Blue Cross/Blue Shield of Massachusetts, Inc. ("BCBS") (C.A. No. 93-12230-RCL) (the "Consolidated Actions") be consolidated with the above-captioned Civil Action. In support of its motion, TSI states as follows:

1. Civil Action 93-11283-RCL of the above-referenced Consolidated Actions commenced in this Court on June 11, 1993. On June 17, 1993, TSI commenced the action styled Tingley Systems, Inc. v. Bay State HMO Management, Inc. in the United States District Court for

the Middle District of Florida. That case was subsequently moved to this Court and assigned Civil Action No. 93-12230-H, and then consolidated with Civil Action No.

* * *

WHEREFORE, TSI respectfully requests that the related actions styled Bay State Bay State [sic] HMO Management, Inc. v. Tingley Systems, Inc. (C.A. No. 93-11283-RCL), and Tingley Systems, Inc. v. Bay State Health Management, Inc., f/k/a Bay State HMO Management, Inc. and Blue Cross/Blue Shield of Massachusetts, Inc. (C.A. No. 93-12230-RCL) be consolidated with the above-named Civil Action.

Respectfully submitted,

/s/ Guillermo A. Pernas
G. Donovan Conwell, Jr.
Florida Bar No. 371319
Guillermo A. Pernas
Florida Bar No. 0000574
Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.
Post Office Box 1438
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Counsel for Tingley Systems, Inc.

Laurence H. Reece, III
Bar No.: 414460
Heidlage & Reece, P.C.
One Liberty Square
Boston, Massachusetts 02109
(617) 423-1200
Local Counsel for
Tingley Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel for CSC at Five Cambridge Center, Cambridge, MA 02142 by U.S. Mail this 10 day of February, 1995.

/s/ Guillermo A. Pernas
Attorney

CourtLink Details for ** Case: 1:93cv12230 **

Date Printed: 1/27/99 9:59:35 AM
Court: Federal District Court – District of Massachusetts (Boston)
Case: Tingley Systems v. Bay State Health, et al
Judge: Judge Reginald C. Lindsay
Filed On: 10/14/93
Note: Dkt # in Middle Dist FL: is 93-993

Names

Litigant	Litigant's Attorney
TINGLEY SYSTEMS Plaintiff	Edward P. Leibensperger [COR LD NTC] Christa von der Luft [COR LD NTC] Nutter, McClennen & Fish One International Place Boston, MA 02110-2699 617-439-2000 George D. Conwell, Jr. [COR LD NTC] Guillermo A. Pernas, Jr. [COR LD NTC] Brent J. Gibbs [COR LD NTC] Fowler, White, Gillen P.O. Box 1438 Tampa, FL 33601 813-228-7411 Laurence H. Reece, III [term 05/28/98] [COR LD NTC] Heidlage & Reece One Liberty Square Boston, MA 02109 617-423-1200

v.

BAY STATE HEALTH MANAGEMENT, INC. fka Bay State HMO Management, Inc. Defendant	Richard W. Benka Kathryn Partridge [term 03/30/95] [COR LD NTC] Marc K. Temin [COR LD NTC] Foley, Hoag & Eliot One Post Office Square Boston, MA 02109 617-832-1000
CSC CONSULTING, INC. fka CSC Partners, Inc. Consolidated Defendant	Andrew C. Griesinger [COR LD NTC] Michael A. Walsh [COR LD NTC] Choate, Hall & Stewart Exchange Place Boston, MA 02109 617-227-5020

Federal District Court – District of Massachusetts (Boston)

Tingley Systems v. Bay State Health, et al

Docket as of July 14, 1998 10:49 pm

1	10/14/93	Original file, certified copy of transfer order and docket sheet received from District of Middle Florida (Tampa) (bdb) [1:93cv12230]
2	10/15/93	Judge Edward F. Harrington – FINAL PRETRIAL CONFERENCE ORDER: set pretrial conference for 2:00 10/17/94 (mb) [Entry date 10/18/93] [1:93cv12230]

3	10/19/93	Answer to Complaint by Bay State HMO Manage (mb) [1:93cv12230]
4	11/8/93	Amended Answer to Complaint by Bay State HMO Manage: amends [3-1] answer (mb) [Entry date 11/12/93] [1:93cv12230]
--	12/17/93	Consolidated Member Case – Lead Case Number: 93cv 11283 (mb) [1:93cv12230]
5	4/25/94	Letter by Marc K. Temin dated: April 25, 1994 to: Leann Ouellette re: copy of letter to Laurence Reece that hearing set for 4/27/94 is cancelled, filed. (wbs) [Entry date 04/28/94] [1:93cv12230]
6	6/28/94	Letter dated: June 28, 1994 to: Lisa Hourihan re: Tingley Systems will be filing a sur-reply to the reply memorandum by Bay State, filed. (wbs) [1:93cv12230]
7	8/15/94	Motion by Tingley Systems for leave to file amended complaint and add parties, filed c/s. (wbs) [Entry date 08/16/94] [1:93cv12230]
8	8/29/94	Response by Bay State HMO Manage to [7-1] motion for leave to file amended complaint and add parties, filed c/s. (wbs) [Entry date 08/30/94] [1:93cv12230]
--	9/15/94	Motion by Tingley Systems to modify scheduling order, filed (See 93-11283 Lead Case). (wbs) [Entry date 09/16/94] [1:93cv12230]

--	9/15/94	Affidavit of George D. Conwell Jr., re: [0-1] motion to modify scheduling order, filed (See 93-11283 Lead Case). (wbs) [Entry date 09/16/94] [1:93cv12230]
9	9/16/94	Motion by Tingley Systems to compel production of * * * cc/cl. (wbs) [Entry date 08/10/95] [1:93cv11283 1:95cv10284]
--	7/25/95	Motion by Bay State HMO Manage in 1:93-cv-11283, Bay State Health in 1:93-cv-12230 for reconsideration of [145-1] order in 1:93-cv-11283, [0-1] order in 1:93-cv-12230 and order allowing Tingley Systems additional deposition discovery pursuant to amended complaint with oral argument, filed c/s. Referred to Mag. Judge Marianne B. Bowler (wbs) [Entry date 08/09/95] [1:93cv11283 1:93cv12230]
--	7/25/95	Answer by CSC Consulting, Inc. in 1:93-cv-11283, CSC Consulting, Inc. in 1:95-cv-10284 to amended complaint, filed c/s.; jury demand (wbs) [Entry date 08/09/95] [1:93cv11283 1:95cv10284]
--	7/25/95	Counterclaim by CSC Consulting, Inc. in 1:93-cv-11283, CSC Consulting, Inc. in 1:95-cv-10284 against Tingley Systems in 1:93-cv-11283, Tingley Systems, Inc. in 1:95-cv-10284, filed c/s. (wbs) [Entry date 08/09/95] [1:93cv11283 1:95cv10284]

--	7/25/95	Objections and Motion by CSC Consulting, Inc. in 1:93-cv-11283, CSC Consulting, Inc. in 1:95-cv-10284 for reconsideration of [145-1] order in 1:93-cv-11283, [0-1] order in 1:95-cv-10284, filed c/s. (wbs) [Entry date 08/09/95] [1:93cv11283 1:95cv10284]
--	7/25/95	Objections by CSC Consulting, Inc. in 1:93-cv-11283, CSC Consulting, Inc. in 1:95-cv-10284 to [47-1] report and recommendations in 1:95-cv-10284, filed c/s. (wbs) [Entry date 08/09/95] [1:93cv11283 1:95cv10284]
--	7/26/95	Second Amended complaint by Tingley Systems, Inc in 1:93-cv-11283, Tingley Systems in 1:93-cv-12230, Tingley Systems, Inc in 1:95-cv-10284 filed. [Answer due 8/5/95 for CSC Consulting, Inc. in 1:93-cv-11283, for Blue Cross & Blue in 1:93-cv-11283, for Bay State Health in 1:93-cv-11283, for Tingley Systems in 1:93-cv-11283, for CSC Consulting, Inc. in 1:93-cv-12230, for Bay State Health in 1:93-cv-12230, for Blue Cross & Blue in 1:93-cv-12230, for CSC Consulting, Inc. in 1:95-cv-10284). Amended complaint amends [0-1] amended complaint in 1:93-cv-11283, [10-1] amended complaint in 1:93-cv-12230, [48-1] amended complaint in 1:95-cv-10284; jury demand. (wbs) [Entry date 08/09/95] [1:93cv11283 1:93cv12230 1:95cv10284]
--	7/26/95	Objections by Tingley Systems in 1:93-cv-11283, Tingley

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TINGLEY SYSTEMS, INC.,	)	
Plaintiff,	)	**Civil Action No. 95-10284-RCL**
v.	)	
CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC.,	)	
Defendant.	)	

TSI'S OPPOSITION TO CSC'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, TINGLEY SYSTEMS, INC. ("TSI"), hereby files this Opposition to the motion of Defendant, CSC CONSULTING, INC. f/k/a CSC PARTNERS, INC. ("CSC"), for summary judgment and alleges:

STATEMENT OF THE CASE AND FACTS

TSI is a family run business that creates, sells and supports computer software for the Health Maintenance Organization ("HMO") industry. TSI and one of its customers, Bay State HMO Management, Inc. ("Bay State") had a dispute concerning Bay State's alleged use of the TSI software to create software to which Bay State claimed ownership. When TSI indicated that they would be suing Bay State concerning this dispute, Bay State sued TSI in United States District Court in Boston, Massachusetts seeking a declaratory judgment that Bay State

owned the new software. TSI then immediately sued Bay State in the United States District Court for the Middle District of Florida alleging misappropriation of TSI's trade secrets in the file structure of its proprietary software and breach of the software license agreement. Bay State successfully

* * *

opposed the motion, representing, among other things, that the claims in the suits were not the same. (Ex.5). CSC also said in its Opposition that " . . . Bay State and CSC are **entirely** independent of one another . . . ". (Ex.5). At the hearing on the motion, CSC represented:

> . . . the issues [in the Bay State and CSC cases] are not the same . . . The main issue [in the Bay State case] is the contract claim. . . . which doesn't involve us [CSC] at all. The software which is at issue is the extraction software which CSC had nothing to do with writing . . . There are some common issues . . . but most of it has nothing to do with us [CSC]. . . . they're not the same cases by any stretch of the imagination. (Ex.6).

The order consolidating the CSC case with the Bay State cases provides that the cases will be tried together. Even before consolidation, all hearings in the Bay State cases and this case were set and conducted at the same time. The parties stipulated to an Order that all discovery in the Bay State cases could be used in the CSC case as if taken in that case. (Ex.7). The Bay State cases and this case became one case for all practical purposes.

In August, 1995, counsel for TSI and the Bay State defendants agreed to have settlement discussions. (Conwell Decl. Ex.4). TSI made a demand that would have settled all three consolidated cases if accepted and told counsel for the Bay State defendants that he would leave it to him to contact CSC's counsel about their client's contribution. *Id.* He reported back that CSC was not interested in discussing settlement at this time and that CSC was willing to continue litigating with TSI. *Id.* He then argued that since TSI's claims against CSC would continue to be litigated if TSI settled only with the Bay State defendants, then TSI's settlement demand

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BAY STATE HMO MANAGEMENT, INC., Plaintiff, v. TINGLEY SYSTEMS, INC., Defendant.	CIVIL ACTION NO. 93-11283-RCL (Filed Sept. 7, 1995)
TINGLEY SYSTEMS, INC., Plaintiff, v. BAY STATE HEALTH MANAGEMENT, INC., f/k/a BAY STATE HMO MANAGEMENT, INC., Defendant.	CIVIL ACTION NO. 93-12230-RCL
TINGLEY SYSTEMS, INC., Plaintiff, v. CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC., Defendant.	CIVIL ACTION NO. 95-10284-RCL

STIPULATION AND ORDER REGARDING USE OF DISCOVERY

The plaintiff, Tingley Systems, Inc. ("TSI"), and the defendant, CSC Consulting, Inc. ("CSC"), stipulate and agree as follows:

1. All depositions taken in the Bay State cases (Case numbers 93-12230 and 93-11283) may be used in the litigation between TSI and CSC (Case number 95-10284) (hereinafter the "CSC case"), as if taken in the CSC case. To the extent that CSC did not receive notice of, have representation at or participate in such depositions, such fact shall not be a ground for objecting to the use or admission into evidence of the transcripts of, and exhibits to, such depositions at trial in the CSC case. All other grounds for objecting to the use or admissibility of the transcripts of, or exhibits to, such depositions which are available to any party under the Federal Rules of Evidence and the Federal Rules of Civil Procedure shall be preserved without prejudice.

2. CSC may depose any witnesses deposed in the Bay State cases for the purpose of conducting further examination of that witness. TSI shall be permitted to conduct re-direct or cross-examination (whichever applies) of any such witnesses, if CSC conducts further examination. The right of CSC or TSI to move for a protective order to protect against undue repetition or harassment or any other alleged abuse of the deposition is preserved.

3. All objections of CSC, including objections as to form, to any question posed to any witness deposed in the Bay State cases shall be reserved until time of trial.

All motions to strike of CSC which otherwise would be required to be made during the deposition shall be reserved until time of trial.

4. If either party makes any deposition designations for use at trial, the opposing party shall be required to assert any objections as to form with regard to each of those designations by any court-imposed deadline.

For Tingley Systems, Inc.:

/s/ G. Donovan Conwell, Jr.
G. Donovan Conwell, Jr.
Florida Bar No. 371319
Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.
P.O. Box 1438
Tampa, FL 33601
(813) 228-7411

/s/ Laurence H. Reece, III
Laurence H. Reece, III
BBO #414460
Heidlage & Reece, P.C.
One Liberty Square
Boston, MA 02109
(617) 423-1200

For CSC Consulting, Inc.

/s/ Michael Arthur Walsh
Michael Arthur Walsh
BBO #514875
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 248-5000

DONE and ORDERED this 12th day of September, 1995.

/s/ Marianne B. Bowler
Marianne B. Bowler, U.S.M.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BAY STATE HMO MANAGEMENT, INC., Plaintiff, v. TINGLEY SYSTEMS, INC., Defendant.	CIVIL ACTION NO. 93-11283-RCL
TINGLEY SYSTEMS, INC., Plaintiff, v. BAY STATE HEALTH MANAGEMENT, INC., f/k/a BAY STATE HMO MANAGEMENT, INC., Defendant.	CIVIL ACTION NO. 93-12230-RCL
TINGLEY SYSTEMS, INC., Plaintiff, v. CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC., Defendant.	CIVIL ACTION NO. 95-10284-RCL

DEFENDANT CSC CONSULTING, INC.'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT AND COUNTERCLAIM

ANSWER

As and for its answer and defenses to the Amended Complaint (the "Complaint") filed by plaintiff, Tingley Systems, Inc. ("TSI"), in this civil action, defendant, CSC Consulting, Inc. ("CSC"), alleges as follows:

* * *

24. In response to the allegations in paragraph 24 of TSI's Complaint, CSC states that the provisions of the License speak for themselves.

25. CSC denies that it integrated or copied any information concerning TSI software in the design of POS, DSS or BayStar. CSC admits that some of its employees received and reviewed limited information concerning what Bay State data was stored by the system which operated the TSI software, that, after CSC had developed a logical data model for the BayStar system, some of its employees did some rudimentary data mapping work to determine what existing Bay State data would be available for conversion into that logical data model, and that one or more of them created one or more rudimentary hand sketches showing where some of Bay State's data might be stored in the information system then used by Bay State. To the extent not specifically admitted herein, the allegations set forth in paragraph 25 of the Complaint are denied.

26. Paragraph 26 of TSI's Complaint states conclusions of law as to which responsive pleading is not

required. To the extent that paragraph 26 of TSI's Complaint alleges any fact, CSC denies that allegation.

27. CSC admits the first sentence of paragraph 27 of the Complaint. CSC admits that for a limited period of time, certain of its employees worked on the same floor as members of Bay State's MIS staff. CSC admits that some of its personnel had access to terminals which were connected to computers which did not operate the TSI software, which computers, in turn, were connected by an ethernet connection to a mainframe computer which did operate the TSI software. CSC denies, however, that any of its personnel had the ability or means to operate or gain access to any programs on the

* * *

43. Paragraph 43 of TSI's Complaint states conclusions of law as to which responsive pleading is not required. To the extent that paragraph 43 of TSI's Complaint alleges any fact, CSC denies that allegation.

44. Paragraph 44 of TSI's Complaint states conclusions of law as to which responsive pleading is not required.

45. Paragraph 45 of TSI's Complaint states conclusions of law as to which responsive pleading is not required.

Count III

46. CSC realleges and incorporates herein its answers to the allegations made in paragraphs 1 through 33 above.

47. Paragraph 47 of TSI's Complaint states conclusions of law as to which responsive pleading is not required. To the extent that paragraph 47 of TSI's Complaint alleges any fact, CSC is without knowledge or information sufficient to form a belief as to the truth of that allegation, except that CSC admits that TSI has not authorized it to copy, reproduce, manufacture, duplicate, disseminate, distribute, make derivative works or use the TSI software.

48. Paragraph 48 of TSI's Complaint states conclusions of law as to which responsive pleading is not required. To the extent that paragraph 48 of TSI's Complaint alleges any fact, CSC denies that allegation.

49. Paragraph 49 of TSI's Complaint states conclusions of law as to which responsive pleading is not required. To the extent that paragraph 49 of TSI's Complaint alleges any fact, CSC denies that allegation.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BAY STATE HMO MANAGEMENT, INC.,

Plaintiff,

v.

TINGLEY SYSTEMS, INC.,

Defendant.

C.A. NO. 93-11283-RCL

TINGLEY SYSTEMS, INC.,

Plaintiff,

v.

BAY STATE HEALTH MANAGEMENT, INC. f/k/a BAY STATE HMO MANAGEMENT, INC. and BLUE CROSS/BLUE SHIELD OF MASSACHUSETTS, INC.,

Defendants.

C.A. NO. 93-12230-RCL

TINGLEY SYSTEMS, INC.,

Plaintiff,

v.

CSC CONSULTING INC., f/k/a CSC PARTNERS, INC.,

Defendant.

C.A. NO. 95-10284

SECOND AMENDED COMPLAINT (CONSOLIDATED CASE) INJUNCTIVE RELIEF REQUESTED

Plaintiff, Tingley Systems, Inc. ("TSI"), sues the defendants, Bay State Health Management, Inc. f/k/a Bay State HMO Management, Inc. ("Bay State HM") and Blue Cross and Blue Shield of Massachusetts, Inc. ("BCBSMA"), and alleges:

Parties

1. TSI is a Florida corporation with its principal place of business in San Antonio, Florida. TSI creates, supports and

* * *

in their possession, custody or control, including but not limited to the POS and DSS software. TSI further requests that this Court (1) award TSI damages; (2) award TSI its attorney's fees pursuant to 17 U.S.C. § 505, the cost of suit and interest; and (3) award TSI such other and further relief as the Court deems just and proper.

Count V

(Fraud – Bay State HM and BCBSMA)

75. TSI realleges and incorporates herein the allegations made in paragraphs 1 through 47 above.

76. Bay State HM and BCBSMA intentionally made certain representations to TSI as alleged in paragraphs 29-32 and 42 above.

77. Said representations were false.

78. Bay State HM and BCBSMA knew that said representations were false.

79. Bay State HM and BCBSMA made said representations to TSI with the intent that TSI rely thereon.

80. TSI did rely upon said representations to its detriment.

81. As a result thereof, TSI suffered damages in an amount to be determined at trial.

WHEREFORE, TSI requests that this Court award TSI compensatory and punitive damages, attorney's fees, costs,

Count VI

(Fraud – Bay State HM)

82. TSI realleges and incorporates herein the allegations made in paragraphs 1 through 47 above.

83. Between April and December, 1990, Bay State HM negotiated with TSI to purchase rights to utilize the TSI software to develop its own software packages. Margie Tingley sent a letter to James Carmona of Bay State HM informing him that the right to use the TSI software for these purposes would cost $5,000,000, with the understanding that such an agreement would not affect TSI's copyright in the software.

84. Jim Carmona represented to TSI on behalf of Bay State, in April or May, 1990 and in October of 1990, that a "Chinese wall" and clean room development approach were being utilized by Bay State to develop Bay State-owned software, and that no one who worked with

or had access to the TSI system would be developing Bay State-owned software. He represented that all Bay State-owned software was being created through "independent development".

85. Despite the representation by Bay State that it was using "Chinese wall" and clean room development procedures to develop its own software, no such procedures were used. Bay State programmers who worked regularly on the TSI software were the developers of BayStar. TSI's file structures, which are part of the TSI software, were disclosed to CSC. Bay State gave CSC personnel access to confidential and proprietary information about the TSI system including, but not limited to, the file structures, data

* * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 1995, a true and correct copy of the foregoing was furnished by U.S. Mail to Andrew C. Griesinger, Esquire of Choate, Hall & Stewart, Exchange Place, 53 State Street, Boston, Massachusetts 02109-2891 and to Marc Temin, Esquire of Foley, Hoag & Eliot, One Post Office Square, Boston, Massachusetts 02109.

/s/ Guillermo A. Pernas
Attorney

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 98-2334	Case No. 96-1574
TINGLEY SYSTEMS, INC.,	TINGLEY SYSTEMS, INC.,
Plaintiff-Appellant,	Defendant-Appellant,
v.	v.
CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC.	BAY STATE HMO MANAGEMENT, INC., ET AL.,
Defendant-Appellee.	Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEE CSC CONSULTING, INC.

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* * *

stipulation; TSI instead proceeded (correctly) as if the Bay State Case and the CSC Case were not the same action.[4] In short, TSI knew perfectly well at the time it stipulated to the dismissal of the Bay State Case that the CSC Case was a separate and distinct civil action, and it acted in accordance with this knowledge.[5] Its argument on appeal that this Court should nevertheless disregard the separate identify of the CSC Case in construing the effect of the dismissal to which TSI stipulated in the Bay State Cases is undercut by its own conduct in entering into that stipulation.

TSI's argument that the CSC Case and the Bay State Case lost their status as separate actions upon the district court's consolidation of the cases must be rejected for a third reason. TSI claims that "[t]here are sound policy reasons for treating the consolidated Bay State and CSC cases as a single action for *res judicata* purposes." *TSI's*

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[4] Had CSC been a party to the same action in which other parties sought the entry of a final judgment upon their claims, those parties would have been required to seek the entry of such a judgment by way of a motion under F. R. Civ. P. 54(b), instead of by stipulation.

[5] In fact, the record before the district court was uncontradicted that the fact that the CSC Case and the Bay State Case were separate and district actions was brought to the attention of TSI's counsel before TSI stipulated to the dismissal of the Bay State case. TSI was informed by counsel to Bay State that CSC's signature upon the stipulation of dismissal in the Bay State Case "was not required . . . because [CSC] was a party to a separate, albeit consolidated action." App. 2284.

Principal Brief at 24. Specifically, TSI claims that the consolidation of the CSC Case with the Bay State Cases served the same interests which are protected by the *res judicata doctrine*. *Id*. 24. This contention is premised upon TSI's view that, due to the consolidation of the two cases, "[f]or all practical purposes, CSC and Bay State were co-defendants in a single lawsuit." *Id*. 25. One need look no further than the record of the proceedings before the trial court in the consolidated cases for a complete rebuttal of this argument.

Discovery in the Bay State Case was originally scheduled to be completed by October 1, 1994. App. 148. Pursuant to TSI's motion, on September 21, 1994 the district court extended the date for the completion of all discovery in the Bay State Case to November 30, 1994. App. 48-49, 194. At the same time, the district court scheduled trial to commence on May 30, 1995. App. 49, 194-95. On December 2, 1994, after the discovery period in the Bay State Case had expired, TSI filed a motion to extend discovery in the case so that it could conduct certain additional discovery, and so that it could complete certain other discovery which it had already commenced. App. 50, 237-54. It characterized this discovery as "critical to TSI's case." App. 254. On December 12, 1994, almost two weeks after the expiration of the discovery period, TSI filed a motion seeking leave to take in excess of fifteen depositions in the Bay State Case. App. 51, 326-46. In this motion, TSI claimed that it needed to depose certain additional CSC employees, as well as a number of additional Bay State employees, in order to prepare its case for trial. TSI characterized these additional depositions as "essential" and "crucial" to its case. App. 342.

By orders dated December 16 and December 21, 1994, respectively, the district court denied TSI's motions to further extend the discovery period in the Bay State Case and for leave to take in excess of fifteen depositions. App. 347, 348. TSI then moved for reconsideration of these orders. App. 349-55. On February 9, 1995, with fifteen weeks remaining until trial was scheduled to commence in the Bay State Case and while its motion for reconsideration of the district court's orders terminating discovery in the case was pending, TSI filed its separate civil action against CSC. App. 86, 1622-61.

TSI filed the CSC Case without ever having sought leave to amend its complaint in the Bay State Case in order to add CSC as a party defendant to that case. TSI's claims against CSC were instead filed in a separate civil action. On February 21, 1995, TSI filed a motion in the CSC Case seeking leave to take expedited discovery in that case on the purported ground that such discovery was necessary to support a motion for a preliminary injunction which TSI said that it intended to file against CSC.[6] App. 86, 1671-96. Pursuant to this motion, TSI sought leave to conduct in the CSC Case, on an expedited basis, the very discovery which the district court had forbidden it from conducting in the Bay State Case. On February 27, 1995, TSI filed a motion seeking to consolidate the CSC Case with the Bay State Case so that the discovery which it obtained on an expedited basis in the CSC Case could be used at the trial of the Bay State Case,

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[6] In fact, no motion for a preliminary injunction was ever filed in the CSC Case.

which at that time remained scheduled for May 30, 1995.[7] App. 86.

This record bespeaks TSI's motivation for filing its claims against CSC in a separate action. By seeking leave to amend its complaint in the Bay State Case to add CSC as a defendant in that case, TSI would have avoided improper claim-splitting, but it would have been left bound by the court's orders terminating discovery in the Bay State Case. TSI instead consciously chose a course of action which, though requiring it to improperly split its claims against CSC, allowed it to circumvent the district court's discovery orders in the Bay State Case. In its order allowing TSI's consolidation motion, the district court observed that

> [b]oth CSC and Bay State legitimately point out that TSI is attempting to obtain, through instituting the CSC action, the discovery it was denied in the fall of 1994 in the TSI action. TSI did not satisfactorily address the question posed at the June 5, 1995 hearing about why it chose not to seek leave to amend its complaint in the TSI action to add CSC as a party.

App. 1888. TSI belatedly tries, on appeal, to contrive an explanation that would be responsive to the question which it was unable to satisfactorily address at the hearing before the district court upon its consolidation

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[7] Thus, in support of its motion for expedited discovery in the CSC Case, TSI argued that "[i]f, as expected, the Court grants TSI's Motion to Consolidate, it will be necessary for discovery to be expedited and completed in this action in advance of the trial in the Bay State actions. . . . " App. 1740-41.

motion. TSI now says that a motion to amend its complaint in the Bay State case to add CSC as a party defendant in that litigation would have been futile. *TSI's Principal Brief* at 29.

Although, under F. R. Civ. P. 15(a), TSI could not, as a matter of right, have amended its complaint in the Bay State Case to add CSC as a defendant to that case in December, 1994 (which is when it now claims to have learned of its cause of action against CSC, *TSI's Principal Brief* at 28), it most certainly could have moved for leave to amend its complaint at that juncture.[8] TSI's suggestion that, as of December, 1994, it was too late even to *move* to amend its complaint in the Bay State Case is, once again, flatly contradicted by events which actually occurred. On February 17, 1995 – two months after it claimed to have learned of the facts underlying its suit against CSC and one week after it filed its separate case against CSC – TSI in fact filed a motion to amend its complaint in the Bay State Case. App. 11, 394-406. That motion, which sought to assert additional claims against the defendants in the Bay State Case, was allowed. App. 1916-23. It is difficult to accept TSI's contention that, as of December, 1994, it was too late for TSI to file a motion requesting leave to amend its complaint to add CSC as a defendant to the Bay State Case, when, two months later, it was not too late for TSI to file a motion to amend its complaint to

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[8] It seems unlikely that the defendants in the Bay State Case, who presumably would have welcomed a co-defendant to share the burden of defending the case and the risk of exposure to liability (not to speak of the concomitant contribution to any settlement of the case), would have opposed such a motion.

allege additional claims against the existing defendants in that case. It is equally difficult to understand why, as of December, 1994, it could have been too late for TSI to seek to add CSC as a defendant to the Bay State Case, when, two months later, it was not too late for TSI to file an entirely separate case against CSC and thereupon move to consolidate this newly filed case with the Bay State Case for purposes of a trial then scheduled to commence only three months later.

TSI cannot have it both ways. Having chosen to institute a new civil action against CSC for the purpose of achieving litigation objectives that could only be achieved by virtue of the fact that its suit against CSC was separate and district from the Bay State Case (and therefore not subject to the discovery orders entered in the Bay State Case), TSI cannot now plausibly argue that the consolidation of the CSC Case with the Bay State Case served the *res judicata* doctrine's policy of " 'reliev[ing] parties of the cost and vexation of multiple lawsuits, [and] conserv[ing] judicial resources.' " *TSI's Principal Brief* at 24 (*quoting Apparel Art*, 48 F.3d at 583). The filing of TSI's separate action against CSC, in lieu of an amendment to TSI's complaint adding CSC as a defendant to the Bay State Case, most certainly did not serve the interest of preventing repetitious lawsuits. To the contrary, that action *gave rise to* a repetitious lawsuit. Nor did the filing of a separate action against CSC, in lieu of adding CSC as a defendant to the Bay State Case, conserve judicial resources. To the contrary, the filing of the CSC Case was the device by which TSI sought to conduct the additional discovery which it regarded as "essential" and "crucial" in the Bay State Case. The filing of the CSC Case therefore

required the trial court to supervise what was in effect an entirely new round of discovery for use in the Bay State Case. These deleterious effects of the filing of TSI's claims against CSC in a separate action did not somehow disappear simply because the CSC Case was consolidated with the Bay State Case five months later.

In conclusion, there is no merit to TSI's argument that the policies underlying the *res judicata* doctrine would not be served by the doctrine's application to TSI's claims against CSC in this case due to the consolidation of the CSC Case with the Bay State Case. To the contrary, those policies cry out for such an application of the doctrine in the CSC Case notwithstanding the trial court's consolidation order. The district court correctly determined that the CSC Case was a separate action notwithstanding its consolidation with the Bay State Case.

B. The District Court Correctly Determined That CSC Was In Privity With Bay State Within The Meaning Of The *Res Judicata* Doctrine.

1. The District Court Correctly Determined That CSC And Bay State Were Privies For *Res Judicata* Purposes Because They Were Alleged To Be Co-Conspirators And Co-Perpetrators Of Joint Harms.

"Under *res judicata*, a final judgment on the merits bars further claims by parties *or their privies* based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added) (citations omitted). Thus, "a non-party defendant [in a subsequent case] can assert *res judicata* so long as it is in 'privity' with the

named defendant [in the earlier case]." *Russell v. Sun-America Sec., Inc.*, 962 F.2d 1169, 1173 (5th Cir. 1992) (citations omitted).

CSC is a privy of Bay State within the meaning of the *res judicata* doctrine under the principle of nonmutual claim preclusion. That principle originated in cases decided by the Third Circuit Court of Appeals. In *Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972), the Third Circuit construed its earlier ruling in *Bruszewski v. United States*, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950), which "held that *res judicata* may be invoked against a plaintiff who has previously asserted essentially the same claim against

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BAY STATE HMO MANAGEMENT, INC., Plaintiff, v. TINGLEY SYSTEMS, INC., Defendant.	C.A. NO. 93-11283-RCL
TINGLEY SYSTEMS, INC., Plaintiff, v. BAY STATE HEALTH MANAGEMENT, INC. f/k/a BAY STATE HMO MANAGEMENT, INC. and BLUE CROSS/BLUE SHIELD OF MASSACHUSETTS, INC., Defendants.	C.A. NO. 93-12230-RCL (Filed Dec. 19, 1994)

PLAINTIFF, TINGLEY SYSTEMS, INC.'S, MOTION TO TAKE IN EXCESS OF FIFTEEN (15) DEPOSITIONS AND SUPPORTING MEMORANDUM

Plaintiff, Tingley Systems, Inc. ("TSI"), pursuant to Federal Rules of Civil Procedure 26(b)(2) and 30(a)(2), and Local Rule 26.1, moves this Court for the entry of an order allowing TSI to take in excess of fifteen (15) depositions. The motion should be allowed because (1) This action is complex. It involves two consolidated cases,

involving multiple parties, numerous legal claims and nearly 50,000 documents. Nearly 100 witnesses and multiple computer consulting firms have been identified who played a part in the misappropriation of TSI's proprietary software and related system structure and architecture. Three different computer systems, known as POS, DSS and Baystar, valued at twenty six million dollars

* * *

[Motion denied without prejudice to its being renewed once the court has ruled on Tingley's Motion to Compel Production of Documents.

/s/ Reginald C. Lindsay
12/21/94

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-2334	No. 97-1574
TINGLEY SYSTEMS, INC.,	TINGLEY SYSTEMS, INC.,
Plaintiff, Appellant,	Defendant, Appellant,
v.	v.
CSC CONSULTING, INC., f/k/a CSC PARTNERS, INC.	BAY STATE HMO MANAGEMENT, INC., ET AL.,
Defendant, Appellee.	Plaintiffs, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF OF APPELLANT, TINGLEY SYSTEMS, INC.

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* * *

F.2d 768, 771 n. 7 (5th Cir. 1982); *Cablevision Sys. Dev. v. Motion Picture Assn.*, 808 F.2d 133, 136 n. 3 (D.C. Cir. 1987). Tingley explained this in its Initial Brief and CSC, once again, was unable to, and did not, respond to it.

Tingley contends that the Order consolidating the Bay State and CSC cases into one proceeding and Tingley's reliance on that Order, are sufficient reasons for treating the Bay State and CSC cases as one action for res judicata purposes. But there are additional reasons for giving them such treatment, which are found in the policies served by the res judicata doctrine. Res judicata, after all, is a judge-made doctrine created and applied to serve specific purposes. *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 985 F.2d 27, 31 (1st Cir. 1993). Tingley contends that those purposes were served by consolidating the cases into one proceeding. (Initial Brief, pp. 24-25).

CSC never disagrees with Tingley's argument that consolidating cases into one proceeding serves the judicial goals sought to be achieved by the res judicata doctrine. Instead, CSC argues that those goals were not

served in this case because Tingley allegedly filed a second lawsuit and consolidated them for an improper purpose, *i.e.*, to circumvent discovery orders. To make this argument, however, CSC omitted and misstated key facts relevant to CSC's theory.

CSC's argument is premised upon CSC's conclusion that Tingley must have believed when it sued CSC that it could not get important discovery in the Bay State case, and that the CSC lawsuit would enable Tingley to get that discovery. CSC concludes Tingley had such a belief, because on December 16 and 21, 1994, the district court denied Tingley's motions for extending the discovery cutoff and for taking additional depositions. (CSC Brief, p. 15). CSC, however, misstated the dates of Tingley's discovery motions. Tingley's motions were served on November 23 and November 30, 1994, respectively (R.256 and 346). CSC's references to those motions being filed "on December 2, 1994, after the discovery period in the Bay State case had expired," and "on December 12, 1994, almost two weeks after the expiration of the discovery period" is misleading, because it suggests that Tingley had the Gifford documents when it submitted its discovery motions. (Brief, p. 15). Tingley did not obtain the Gifford documents until December 9, 1994, well after Tingley served its discovery motions in November.

The timing of when Tingley received the Gifford documents and when it prepared and sent its discovery motions is important to Tingley's December 30, 1994 motion for reconsideration and Tingley's state of mind regarding the probable outcome of that motion. Tingley's motion for reconsideration was based primarily upon the just-produced Gifford documents and Tingley believed

that this newly obtained and important information would persuade the court to allow Tingley's discovery motions. (R349-393). This would not have been the case if Tingley already had the Gifford documents when it initially submitted its discovery motions in November. CSC's use of the December 12 date to suggest that Tingley had the Gifford documents when it brought its November 30 motion to take more than 15 depositions is misleading.

Curiously, CSC also failed to point out to this Court that the December 21 order denying Tingley's discovery motions expressly provides that it is "without prejudice to its being renewed" after the court ruled on Tingley's motion to compel production of documents. (R.348). The court did not rule on Tingley's motion to compel until June 5, 1995. (R.0023).

In light of these facts, Tingley did not believe on February 9, 1995, when it sued CSC, that the door had been closed on discovery in the Bay State cases. When Tingley sued CSC, both Tingley's motion for reconsideration and its motion to compel production of documents were pending. Tingley fully expected the court to grant these motions. With the benefit of knowing all of the facts, this Court can see that CSC's assertion that the door was closed on discovery in the Bay State case simply is not true and CSC's conjecture that Tingley brought a second suit to circumvent discovery orders is baseless.

CSC's speculation that Tingley filed another lawsuit against CSC, solely to avoid discovery orders entered by the court in the Bay State case, is absurd. If Tingley's purpose in filing a second lawsuit against CSC was to

avoid discovery Orders in the Bay State case, then Tingley would not have filed the CSC suit in the same court as the Bay State case, knowing that it would have to inform the court that the CSC and Bay State cases were related, thereby ensuring that the CSC case would be assigned to the same judge who entered the discovery Orders. Nor would Tingley then file a motion seeking to consolidate the cases so that they would become a consolidated action before the same judge who entered the discovery Orders. But that is exactly what Tingley did. The fact that Tingley intentionally sought to have the CSC case brought before the same judge who entered the discovery Orders and then consolidated with the same case in which those discovery Orders were entered, proves the absurdity of CSC's accusation that Tingley was maneuvering to avoid those discovery Orders.

CSC's summary judgment motion, like its Answer Brief in this Appeal, accused Tingley of filing its lawsuit against CSC to circumvent the December 16 and 21 discovery Orders. Significantly, the district judge whose Orders CSC claims Tingley tried to avoid, disregarded this spurious accusation and did not even bother to address it in his Order granting CSC's motion for summary judgment. Instead of adopting CSC's argument, the district court judge explained that his ruling seemed "harsh" and that he was "constrained" by law to reach it. These are not words of a judge who thinks Tingley has done wrong and is getting what it deserves by an adverse summary judgment.

On page 17 of its Brief, CSC tried to make it look like the district court judge agreed with CSC's accusations of Tingley. The statement that "TSI did not satisfactorily

address the question posed at the June 5, 1995 hearing about why it chose not to seek leave to amend its complaint in the TSI action and add CSC as a party," actually was made by the magistrate judge. In any event, the statement is inconsequential. With all due respect to the Magistrate Judge, that question never was posed to Tingley at the June 5, 1995 hearing. (R.1125-1410). In any event, Tingley addressed that issue in its reply to CSC's opposition to the motion to consolidate. Tingley explained there that the case against CSC was premised primarily upon the Gifford documents that CSC had withheld from discovery. (R.1014-15, *see also,* R. 2163). CSC, by withholding these incriminating documents until after the close of discovery and until the eleventh hour of the Bay State case, put Tingley in a procedural predicament and significantly decreased the likelihood that the court would allow Tingley to amend its pleadings to add CSC as a party. *Id.* Tingley's safest course of action was to sue CSC and then seek to consolidate.

CSC also pondered why Tingley would move to amend its complaint against Bay State in February, 1995, if Tingley thought it was too late in February to move to amend to add CSC as a party. Tingley answered that question in its Initial Brief (pp. 28-29). The Bay State amendment was based upon evidence Tingley learned in discovery and Tingley believed it would not require further efforts by the parties. (R.401). Moreover, it merely added nine new paragraphs to Tingley's already existing complaint against Bay State. (R.401). This is significantly different than bringing a multi-count complaint against a new party. Under the criteria that govern amendments of pleadings, the court was much more likely at that late

date to permit such a limited amendment against an existing defendant than to allow the addition of a new party and the assertion of multiple new claims against that party.

Finally, CSC argued on page 20 of its Brief that Tingley's filing of a second action against CSC and moving to consolidate it with the Bay State case did not serve the interests of preventing repetitious lawsuits and conserving judicial resources. This argument is fatally flawed because it incorrectly assumes that if the court had allowed Tingley to amend to add CSC as a party, then the judicial labor would have been less than it was when Tingley sued CSC in a second case, which the court then consolidated. Except for the motion to consolidate, all of the motions filed in the CSC case would have been filed in the Bay State case, if CSC had been added as a party there. The way in which the court heard the motions would not have changed either. As a convenience to counsel, the court scheduled hearings in both cases to take place at the same time, even before the cases were consolidated (R.1007, 2126). Moreover, the need for the court to "surpervise . . . a new round of discovery" (CSC's Brief, p. 20) would exist even if Tingley had been permitted to amend to add CSC as a party. CSC insisted that it needed its own discovery from Tingley. (R.1700, 1704, 2174, 2176). No matter how Tingley brought CSC into the case, CSC would have sought its own discovery.

Nor can CSC assume that the district court would not have allowed Tingley discovery as to CSC, notwithstanding its December discovery Orders, if Tingley had amended its complaint and added CSC as a party. When multiple new claims are asserted against a new party, a

court normally would allow discovery as to the new claims. This is likely what would have happened here, as evidenced by the fact that, after the court allowed Tingley to amend its complaint against Bay State in 1995 to add a fraud count, the court ordered further discovery on the new allegations. (R.0029-0030).

There is simply no support for CSC's argument that the purposes of res judicata were not served by consolidation here or that Tingley did anything improper. CSC, having been caught by the Gifford documents, obviously is the wrongdoer here. CSC's underlying tortious conduct, followed by its concealment and withholding of the Gifford documents (R.250, 351, 2150, 2163, 1309-10), leaves it in a poor position to argue that this Court is doing the right thing by affirming the judgment in CSC's favor. CSC's manipulation of the facts to make Tingley look like the wrongdoer have not improved CSC's position.

II. Bay State and CSC Were Not in Privity Within the Meaning of the Res Judicata Doctrine.

"Privity," in a broad sense, is a flexible tool used by courts to accomplish the purposes of the res judicata doctrine. Whether the parties are found to be in privity turns ultimately on whether they have a sufficiently close relationship such that the court believes they should have been sued in the same action, if they were sued at all. As this Court said in *In re El San Juan Hotel*, 841 F.2d 6 (1st Cir. 1988), the question to be answered is whether "the new party can show good reasons why he should have

been joined in the first action and the old party cannot show any good

* * *